

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. V-11/09-616  
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 Appeal of )

The petitioner appeals a decision by the Department for Children and Families, Family Services Division, denying her request to expunge her name from the child protection registry. The issue is whether the Department abused its discretion when it denied petitioner's expungement request.

The parties held a telephone status conference on January 5, 2010 and set a briefing schedule. The decision is based on the record below and the parties' written arguments.

1. The petitioner was substantiated twice for physical abuse to her stepdaughters during 2005. Petitioner was first substantiated on or about January 12, 2005 for physical abuse to her stepdaughter, B.F. regarding incidents occurring on December 5 and 8, 2004. B.F. was ten years old at the time. Petitioner was next substantiated on or about July 25, 2005 for physical abuse to her stepdaughter C.F. regarding an incident occurring on April 14, 2005. C.F. was nine years

old at the time.

2. At the time of the first incident, petitioner lived with her husband, K.F., T.E. (her son from a prior relationship who was twelve years old), B.F. (her stepdaughter), C.F. (her stepdaughter), and S.F. (child from her marriage to K.F. who was two years old). Petitioner's family experienced many stressors including K.F.'s alcohol problems, relationship issues (marital and with the children), and money issues. K.F. had custody of his two daughters, and petitioner had cared for her stepdaughters for approximately eight years.

3. On December 5, 2005, petitioner and B.F. argued during the early evening. Petitioner did not want B.F. to go into the room where K.F. was sleeping. B.F. disobeyed. Petitioner went into the room after B.F. where petitioner grabbed B.F.'s arms to pull her from the room. When petitioner grabbed B.F., petitioner's fingernails dug into B.F.'s arms leaving bruises on both arms.

During petitioner's interview with Department staff on December 9, 2004, petitioner reported about an incident that occurred on December 8, 2004. Petitioner and B.F. had an

argument at bedtime in which petitioner restrained B.F. causing additional bruises to B.F.'s forearms.

4. The Department substantiated physical abuse and wrote in the Investigation Summary Form:

. . .a reasonable person would have predicted the harm. The bruises on BF's arms were significant marks. [petitioner] stated that she has to use force with BF, as she is such a large child<sup>1</sup> she can't make her do things without force. DCF believes that [petitioner] used too much force on both occasions. [petitioner] said all the right things; that she didn't intend to hurt her, she said she was sorry, it was accidental, but she left marks on BF on both 12/5/04 and again on 12/08/04 due to using too much force against BF. DCF understands that BF has significant emotional and behavioral issues. . . .

5. B.F. was placed with her mother, J.C. K.F. and petitioner agreed to this placement.

6. On April 14, 2005, petitioner was leaving the science fair with C.F. Petitioner was pushing S.F. in the stroller. C.F. had difficulty carrying her science project due to its weight and asked for help. Petitioner and C.F. argued, and petitioner refused to help C.F. Petitioner hit C.F. under her chin causing C.F. to bite her left inner cheek. On April 15, 2005, the school nurse observed swelling in the middle of the left cheek approximately 2 cm in diameter with a small

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<sup>1</sup>B.F. is described as 5'1" tall and 145 pounds.

white lesion less than .5 cm in the middle. There were also two areas of red petechiae on the outer edge of the swelling.

7. Petitioner was substantiated for physical abuse. C.F. was placed with her mother C.D. The two boys remained with petitioner. The Department continued services. As part of these services, petitioner attended marriage and individual counseling.

8. Since the substantiations, petitioner worked four years as a school bus driver for Percy Transportation. In addition, petitioner worked as a substitute Para educator with a special education student as a one to one aide for one week.

Petitioner continues to have a relationship with her stepdaughters B.F., C.F. and their mother.

9. During 2009, petitioner decided to apply to be a substitute teacher with the local school district. As part of the application process, the school district did a record check and learned that petitioner is on the child protection registry. Petitioner subsequently lost her job with Percy Transportation as a school bus driver due to her placement on the registry.

10. Petitioner applied for expungement on or about October 1, 2009.

11. Petitioner submitted letters to the Department from her co-workers, acquaintances, C.D. and C.F. as part of her application. The information from these letters is set out below:

a. K.L. has known petitioner for twenty-three years. She observed petitioner interact with petitioner's sons and other children the past summer at a recreational program and saw no abuse nor suspected any abuse. K.L. has left her six-year old daughter in petitioner's care on occasion.

b. J.Co. is a friend and co-worker. Her letter is addressed to the school board to ask that petitioner be reinstated as a school bus driver. J.Co. first became acquainted with petitioner while riding on petitioner's school bus for field trips. She worked with petitioner in the middle school when petitioner substituted and stated petitioner "is well-respected in our department . . .she has shown professionalism, compassion, and knowledge of children's needs. . .it is overwhelmingly hoped and agreed upon within our department that she would someday soon hold a permanent position."

J.Co. became a school bus driver about two years ago and took over petitioner's route. She wrote that the parents and students told her how much they missed petitioner.

c. E.K. has known petitioner since high school. He worked for petitioner when she owned a store in the past and observed petitioner first with all four children and then with the two boys. He did not observe any abuse and gave the opinion that petitioner was a caring parent. He then worked with petitioner as a bus driver and said there were no complaints about her behavior.

d. C.D. is a friend and co-worker who has known petitioner for ten years. She wrote that petitioner, as a bus driver, "demonstrated caring, nurturing manner to the students on the bus and at school as well. She is

well respected by those around her and has a positive attitude while working with the students."

C.D. related that petitioner substituted as a Para-educator the last week with a special education student and wrote; "[t]he student looked forward to working with [petitioner] each day, and her caring, compassionate style was rewarding and gratifying to the student. She is patient and uncomplaining about any task she was asked to do."

e. J.C. is the mother of B.F. and C.F. (petitioner's step-daughters). J.C. writes in support of petitioner getting her job back stating that two isolated incidents from five years ago do not make petitioner a child abuser. She indicates that at the time, the girls may have embellished what occurred because they wanted to be with her. J.C. writes that she trusts petitioner as a mother and community member.

f. C.F. writes in support of petitioner.

g. There were also general letters of support from W.L. (co-worker) and S.A. (friend).

12. K.D. is a registry reviewer for the Department. She held the review meeting on October 21, 2009. Petitioner attended. E.P. attended on behalf of petitioner.

13. E.P. is the owner of Percy Transportation. K.D.'s notes indicate that E.P. explained that petitioner worked for her for four years as a bus driver and that petitioner was a "top employee". E.P. observed petitioner with her sons and never saw any inappropriate behavior. E.P. does not think what happened should be an issue for petitioner's employment. She stated that petitioner would not hurt anyone on purpose.

14. On October 28, 2009, the Department issued a Commissioner's Review denying petitioner's request for expungement. The Commissioner's review was signed by K.D. and T.Z., Registry Review Unit Director. Petitioner appealed from this decision to the Human Services Board.

15. In the Commissioner's Review, K.D. summarized petitioner's position that petitioner admitted to the incidents with B.F. and with C.F. but claimed her actions were accidental and that she did not intend to harm either child. Petitioner acknowledged losing her temper and that she made errors in judgment. Petitioner pointed to the stressors in her life at that time and indicated that her stepdaughters were manipulative and exaggerated what happened in order to live with their mother. Petitioner said the Department was unfair in their interpretation of the events.

16. The pertinent part of the Commissioner's Analysis and Decision state:

To your credit, you admit that you did engage in inappropriate physical altercations with BF and CF. However, it remains concerning that you continue to minimize the allegations as exaggerated, that you assert the girls were to blame for many of your problems and that you state the injuries were accidental. . .

I asked you to speak about any activities that would indicate your changed behavior or changed circumstances since the substantiations. You provided written and verbal character references from co-workers, family and

friends, and all statements provided similar positive and supportive testimony to your work ethic and character. You said you have not engaged yourself in any formal counseling since the substantiations, but you did attend individual and couple's counseling after the substantiations, as recommended by DCF. However, you did not provide any professional evidence of what issues were worked on, or what progress was made, related to the central issues surrounding your substantiations, including your documented patterns of overly-aggressive behavior towards your children. Additionally, no documentation was submitted regarding the outcome or results of your past counseling or work you have done to attend to the special needs of at least one of the children who now lives in your home. . .

17. The Commissioner's Review does not analyze how petitioner's employment history of four years working with children impacts on petitioner's position that she no longer presents a risk to children.

18. The Commissioner's Review does not analyze the information from petitioner's references as to her interactions with children and how this impacts on petitioner's position that she no longer presents a risk to children.

#### ORDER

The Department's decision to deny expungement is reversed.

#### REASONS

The overarching purpose of the statutes governing the reporting of abuse is to protect children. 33 V.S.A. §



4911(1). The child protection registry is a tool that is used to further this purpose by providing certain employers and volunteer groups a means to check the suitability of individuals seeking employment or volunteer work with children.

The Vermont Legislature is cognizant of the tension between protecting children and the employment consequences of being placed in the child protection registry. They amended the applicable statutes in 2007 by expanding the purposes of the act and by creating a means to expunge a person's name from the child abuse registry.

The Vermont Legislature addressed this tension by adding 33 V.S.A. § 4911(5), which states:

Establish a tiered child protection registry that balances the need to protect children and the potential employment consequences of a registry record for persons who are substantiated for child abuse and neglect.

Petitioner's decision to seek expungement came after losing her job as a school bus driver and losing her opportunity to apply for substitute teaching as a result of her registry record.

The expungement process is governed by 33 V.S.A § 4916c. The applicable provisions are found in 33 V.S.A. § 4916c(b), which state:

The person shall have the burden of proving that a reasonable person would believe that he or she no longer presents a risk to the safety or well-being of children. Factors to be considered by the commissioner shall include:

- (1) The nature of the substantiation that resulted in the person's name being placed on the registry.
- (2) The number of substantiations, if more than one.
- (3) The amount of time that has elapsed since the substantiation.
- (4) The circumstances of the substantiation that would indicate whether a similar incident would be likely to occur.
- (5) Any activities that would reflect upon the person's changed behavior or circumstances, such as therapy, employment or education.
- (6) References that attest to the person's good moral character.

A person may appeal to the Human Service Board if the commissioner denies his/her request for expungement. The Board's review is set out in 33 V.S.A. § 4916c(e), which states:

The person shall be prohibited from challenging his or her substantiation at hearing, and the sole issue before the board shall be whether the commissioner abused his or her discretion in denial of the petition for expungement. The hearing shall be on the record below, and determinations of credibility of witnesses made by the commissioner shall be given deference by the board.

The sole issue before the Board is whether the Department abused its discretion when they denied

petitioner's request for expungement. The burden is on the petitioner to show that the Department abused its discretion.

The Department bases its decision upon two factors; namely, (1) the petitioner is minimizing her responsibility for her past actions and (2) the petitioner did not provide documentation regarding her counseling.

The petitioner raises several arguments to support her contention that the Department (through the Commissioner's Review) abused their discretion including mischaracterizing the record, failing to adequately analyze all the statutory factors in making the decision, and relying on factors not included in the statute.

Abuse of discretion arises when the decision is made for untenable reasons or the record has no reasonable basis for the decision. State v. Putnam, 164 Vt. 558, 561 (1996); USGen New England, Inc. v. Town of Rockingham, 177 Vt. 193 (2004). Abuse of discretion can extend to a failure to exercise authority. In Re: T.S., 144 Vt. 592, 593 (1984). In addition, abuse of discretion arises when a party is held to a higher standard by the decision-maker than the law provides. Perez v. Travelers Ins. Ex rel. Ames Dept. Stores, Inc., 2006 VT 123 (2006).

The expungement statute sets out six factors for the Commissioner to consider. The expectation is that the analysis will deal with each factor and explain the weight assigned to each factor in the decision. The analysis will delineate why the person has not met his/her burden of showing he/she no longer presents a risk to children. The Commissioner did not do this here.

In particular, the Commissioner did not address factors 5 and 6 of 33 V.S.A. § 4916c(b) other than to simply state in a single sentence without analysis that positive references were provided about petitioner's work ethic and character.

Factor 5 includes employment that would reflect upon the petitioner's changed behavior or circumstances. Petitioner worked four years as a school bus driver. Petitioner has a track record of working with children over a four year period subsequent to the substantiations. Driving a school bus can be stressful; children will not always be well-behaved. Yet, there is no record of petitioner acting in an untoward way towards the children in her charge.

More importantly, the petitioner gave the reviewer information showing that her work, performance, and attitude towards the children was good. In particular, J.Co. alluded to the positive comments she heard from students and parents

about petitioner when she took over petitioner's route. Other co-workers supported her claims. In addition, E.P., her prior boss, took the time to accompany petitioner to the review and speak on petitioner's behalf to the reviewer.

Also, petitioner substituted for a short time as a Para educator with a special education student. C.D. provided information that the student looked forward to working with petitioner given petitioner's "compassionate, caring style". Once again, petitioner has a track record of working with children. J. Co. wrote that her school department looked forward to petitioner joining them.

Factor 6 addresses references. The Commissioner alludes to the letters but does not address the specifics of the information in the letters detailing petitioner's interactions with children. The letters from co-workers are referenced above. In addition, one of petitioner's stepdaughters and the mother of the stepdaughters wrote in support of petitioner.

The question before the Commissioner was whether the petitioner continued to present a risk to children. In making that determination, the petitioner's work with children in the intervening years is relevant to a decision

as is the information from those who have observed petitioner with her own and other children.

However, this evidence was not discussed in the Commissioner's analysis and decision. Failing to address all the factors and evidence is sufficient to support the conclusion that the Commissioner abused his discretion in making a decision in this case. Moreover, the lack of detailing how the various factors were weighed further supports a conclusion that the Commissioner abused his discretion.

Based on the foregoing, the Department through the Commissioner abused their discretion in denying the petition for expungement. The question of appropriate relief remains. Rather than substitute the Board's judgment as to whether the petitioner's name should be expunged from the child protection registry, the case is being remanded to the Department for a thorough and proper analysis of all the criteria including a consideration of the petitioner's actions and behaviors with children subsequent to substantiation, a discussion of the weight attached to all six criteria, the interplay of the criteria, and a look to the facts before the Department.

The Department's decision is reversed and remanded for further consideration by the Department. 3 V.S.A. § 3091(d), Fair Hearing No. 1000.4D.

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